SCC File No. 37250

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

OFFICE OF THE CHILDREN'S LAWYER

APPELLANT

- and -

J.P.B.

RESPONDENT

- and -

C-R.B.

RESPONDENT

FACTUM OF THE RESPONDENT, C-R.B.
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

SENSON LAW
1401 – 80 Richmond Street West
Toronto, ON M5H 2A4
Tel: (416) 306-6485
Fax: (855) 351-9215

Patric Senson
Email: psenson@sensonlaw.com

TAMMY LAW
151 Bloor St. W., Suite 604
Toronto, ON M5S 1S4
Tel: (416) 410-4808
Fax: (416) 691-7368
Email: wingyun@tammylaw.ca

Counsel for the Respondent, C-R.B.

FASKEN MARTINEAU DUMOULIN LLP
55 Metcalfe Street, Suite 1300
Ottawa, ON
K1P 6L5
Tel: (613) 696-6860
Fax: (613) 230-6423

Yael Wexler
Email: ywexler@fasken.com

Ottawa Agent for Counsel for the Respondent, C.-R.B.

ORIGINAL TO: THE REGISTRAR

COPIES TO:

OFFICE OF THE CHILDREN'S LAWYER
393 University Avenue, 14th Floor
Toronto, ON M5G 1W9
Tel: (416) 314-8000
Fax: (416) 314-8050

Caterina E. Tempesta
Email: caterina.tempesta@ontario.ca

Sheena Scott
Email: sheena.scott@ontario.ca

Katherina Kavassalis
Email: Katherine.kavassalis@ontario.ca

HOUGHTON, SLONLOWSKI, STENGEL
170 Division Street
Welland, ON L3B 4A2
Tel: (905) 734-4577
Fax: (905) 732-3764

James Stengel
Email: jstengel@hsslaw.ca

Counsel for the Appellant

GOWLING WLG (Canada) LLP
2600-160 Elgin Street
Ottawa, ON K1P 1C3
Tel: (613) 786-8695
Fax: (613) 788-3509

D. Lynne Watt
Email: lynn.watt@gowlingwlg.com

Ottawa Agent for the Appellant

BOOKMAN LAW PROFESSIONAL CORPORATION
181 Yonge Street, Suite 504
Toronto, ON M4S 3C4
Tel: (416) 488-2242
Fax: (416) 488-4491

Steven M. Bookman
Email: sbookman@bookmanlaw.com

Chris Stankiewicz
Email: cstankiewicz@bookmanlaw.com

Counsel for the Respondent, J.P.B.

SUPREME ADVOCACY LLP
100-340 Gilmour Street
Ottawa, ON K2P 0R2
Tel: (613) 695-8855
Fax: (613) 691-8580

Marie-France Major
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent for Counsel for the Respondent, J.P.B.

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PART I: OVERVIEW AND STATEMENT OF FACTS

1. This case represents this Honourable Court's first opportunity to provide a clear and consistent guide for Canadians as to the correct interpretation of the phrase 'habitual residence' as it applies to the Hague *Convention on the Civil Aspects of International Child Abduction* (*the "Convention"*). This threshold issue, undefined in the Convention itself, is the key concern in determining whether or not a child's removal or retention is, in fact, wrongful. As noted in the Appellant's factum, the determination of habitual residence varies from Province to Province, and indeed internationally, making interpretation of the Convention inconsistent and unpredictable for litigants.

2. Internationally, three different approaches to the interpretation of habitual residence have arisen. One, advocated for by the Appellant in this case, is a child-focused approach, where the circumstances and preferences of the subject children provide the information necessary to determine habitual residence. A second, and the approach taken by the Ontario Court of Appeal, looks exclusively at the intent of both parents in the last location where both parents were resident with the children. The Respondent Mother proposes a third approach, which is gaining acceptance internationally, particularly in Europe and New Zealand, under which a hybrid model is used, that looks both at the situation of the subject children, taking into account their views and preferences, but also at the objective actions and intentions of the parents. The Mother submits that this approach will result in an objectively predictable standard that will generate fewer 'absurd' results, and, if used in the current case, would have prevented the children's removal from Canada only to see them returned months later.

3. The Mother supports the Appellant, the Office of the Children's Lawyer (the "OCL"), in its position seeking an Order that the Order of the Ontario Court of Appeal be set aside and the Respondent Father's Application be dismissed, but on the grounds that under the test proposed by the Mother, the children's habitual residence had shifted to Canada by the time of the Father's Application, and therefore there was no wrongful removal or retention.

FACTS

4. The Mother agrees with the factual record as laid out in paragraphs 5-32 of the Appellant's factum. The facts particularly relevant to the Mother's position on this appeal are as follows:

a. Both parents were citizens of Canada, the Mother through birth, and the Father by naturalization, having been born in Bulgaria and holding Bulgarian citizenship.

Reasons for Decision of Justice MacPherson, dated August 27, 2015 ("Superior Court Decision"), Appellant's Record ("AR"), Vol. 1, Tab 11, at para. 9; Decision of the District Court of Langen (Hessia) ("German Divorce Decision") – *Family Court*, 65 F 29/15S (Germany), dated December 16, 2016, AR, Vol. 1, Tab 23, pg. 146.

b. The parents had two children, B.J.F.B. born September 1, 2002 and M.C.B. born December 15, 2005. Both children were born in Germany, but were not eligible for German citizenship. Rather, both were Canadian citizens.

Superior Court Decision, AR, Vol. 1, Tab 11, at para. 8.

c. The parents moved to Germany for the Father's employment, the Mother was not continuously employed while living in Germany.

Superior Court Decision, AR, Vol. 1, Tab 11, at para. 7.

d. Prior to the Mother's move to Canada the relationship between the parents had been troubled. The parties had, at one point, separated and custody proceedings regarding the children initiated. However, by the time of the Mother's move in 2013 the couple were once again living in the same home.

Superior Court Decision, AR, Vol. 1, Tab 11, at paras. 11-15.

e. The Mother had brought the children to Canada twice prior to the 2013 move. On one of these trips the Mother had enrolled the older child B.J.F.B in a Canadian primary

school. On the second trip, the Mother enrolled both children in the same school in Canada. The father was aware of both these enrolments.

Superior Court Decision, AR, Vol. 1, Tab 11, at para. 11.

f. On March 25, 2013, the Father executed a 16-month Consent that allowed the Mother to move with the children to Canada for the purpose of furthering their education. The Father further signed a letter temporarily transferring custody of the children to their Mother.

Superior Court Decision, AR, Vol. 1, Tab 11, at paras. 11, 12, 72;
Reasons for Decision of Justices Marrocco, Sachs and Varpio, dated January 5, 2016 ("Divisional Court Decision"), AR, Vol. 1, Tab 15, at para. 24.

g. Both parents agreed that the children were suffering from difficulties within the German school system, B.J.F.B. had a potential diagnosis of atypical autism, and could benefit from education in English in Canada.

Affidavit of J.P.B. sworn June 12, 2015 ("B. Affidavit"), AR, Vol. III, Tab 37, at paras. 28-31;
Affidavit of C-R.B., sworn March 2, 2015 ("C-R.B. Affidavit"), AR, Vol. III, Tab 40 at paras. 75-76.

h. The Mother returned to Canada with the children on April 19, 2013 and enrolled them in school. The Mother took up residence in St. Catharines, Ontario, with the maternal grandmother, providing the children with additional familial connection.

Superior Court Decision, AR, Vol 1., Tab 11, at paras. 71-72;
Affidavit of Gillian Sheldrick, sworn August 6, 2015 ("Sheldrick Affidavit"), AR, Vol. 5, Tab 45, at paras. 50-89, 90-93 and 94-99.

i. One week later, the Father contacted the German authorities to inquire about what steps to take if his children had been abducted. This action was seen by the Divisional Court as "most curious."

Divisional Court Decision, AR, Vol. 1, Tab 15, at para. 11.

j. The children were engaged in school for the final part of the 2012-2013 school year, and the entire 2013-2014 school year. The children then continued to be enrolled in, and participate in, school until the Order of the Ontario Court of Appeal sending them back to Germany.

Superior Court Decision, AR, Vol. 1, Tab 11, at para. 70.

k. By the time of their return to Germany in 2016, after living in Canada for 3 and a half years, the children had lost their ability to function in the German language.

Affidavit of C-R.B, sworn May 11, 2017 ("C-R.B. Summer 2017 Affidavit"), Record of the Respondent C-R.B. ("RR of Mother"), Vol 1, Tab 1, at para. 5.

l. As well as attending school, the children were involved in community activities and attended summer camps, made new friends, and in the words of the Applications Judge, "integrated into their community," before the Consent had expired.

Superior Court Decision, AR, Vol. 1, Tab 11, at para. 70.

m. The Mother was solely responsible for the care of the children while in Canada and did not receive any financial support from the Father. As a result the Mother obtained employment while in Canada.

Superior Court Decision, AR, Vol. 1, Tab 11, at para. 90.

n. The Father only visited the children once for 10 days during the consent period.

Superior Court Decision, AR, Vol. 1, Tab 11, at para. 22.

o. The children had a pet dog in Canada that they were concerned they would lose if they had to return to Germany.

Superior Court Decision, AR, Vol. 1, Tab 11, at para. 105.

p. On March 17, 2014 the Father attempted to revoke his consent. Unbeknownst to the Mother, he had initiated custody proceedings in the District Court in Germany, and in June 2014 he also attempted to obtain a certificate of wrongful detention from the German courts pursuant to the Convention. The Father was unsuccessful in both these actions, with the German courts declining to act on the basis the children were habitually resident in Canada. As a result of his failure, the Father instead continued to pursue his Application in Canada.

Superior Court Decision, AR, Vol. 1, Tab 11, at paras. paras 31-45 and 47.

q. The Father's actions resulted in a 10-month delay that allowed for further integration of the children into their home and community in Canada. The Court of Appeal found that this delay by the Father "borders on forum shopping".

Reasons for Decision of Justices Laskin, Sharpe and Miller, dated September 13, 2016 ("Court of Appeal Decision"), AR, Vol. 1, Tab 20, at para. 62; Appellant's factum at paras. 24-26.

r. Following the decision of the Ontario Court of Appeal and the denial of the stay of the Order, the Mother and children returned to Germany.

C-R.B. Summer 2017 Affidavit, RR of Mother, Vol 1, Tab 1, at para. 4.

s. In Germany, the Mother and the children had difficulty adapting to the country. The Father did provide the cost of accommodation, but only on a daily basis, leaving the children in a constant state of concern and instability, not knowing where they would be living the next day. Ultimately the German courts awarded full custody to the

Mother, with the right to return to Canada. In the decision, the court commented that the children's habitual residence was Canada.

German Divorce Decision, AR, Vol. 1, Tab 23, pg. 153.

t. The Mother and children returned to Canada on April 5, 2017, to resume living in St. Catharines.

C-R.B. Summer 2017 Affidavit, RR of Mother, Vol 1, Tab 1, at para. 19.

5. For the remaining facts, the Mother relies on those detailed by the Appellant.

PART II: STATEMENT OF ISSUES

6. The Respondent Mother submits that the primary issue to be determined on this appeal is the definition of 'habitual residence', which is an issue of law. Given the lack of consensus both domestically and internationally an answer to this question will provide predictability to future litigants.

7. The Respondent Mother supports the position of OCL on the remaining issues raised by them, that is the interpretation of the Convention in light of the Convention on the Rights of the Child, the role of the Charter of Rights and Freedoms or the introduction of fresh evidence, but will not be making any submissions on these issues.

PART III – ARGUMENT

Standard of Review

8. The Respondent Mother agrees with the Appellant's position with respect to the standard of review. Specifically, the determination of habitual residence itself normally involves the application of a legal standard to a set of facts, thereby attracting a standard of "overriding

and palpable error" on review. However, this particular appeal concerns the correct characterization of the legal standards to be applied in determining habitual residence, and the standard of review with respect to statements of law expressed by the Court of Appeal attracts the standard of "correctness".

> ***Housen v. Nikolaisen,*** **[2002] 2 SCR 235;**
> ***A.S. v. A.W.,*** **2013 ABCA 133, [2013] A.J. No. 316 (C.A.) (*"A.S. v. A.W."*) at para. 18.**

ISSUE 1: INTERPRETATION OF HABITUAL RESIDENCE

I – POLICY OF THE CONVENTION AND HABITUAL RESIDENCE

9. As stated in the preamble of the Convention, and affirmed by the Supreme Court of Canada in *Thomson v. Thomson*, the underlying purpose of the Convention is to protect children from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the state of their habitual residence.

> ***Hague Convention on the Civil Aspects of International Child Abduction,*** **25 October 1980, Can TS 1983 No. 35 ("Convention"), at Preamble;**
> ***Thomson v. Thomson,*** **[1994] 3 S.C.R. 551 at para. 1.**

10. The Convention does not protect children from all removals or retentions. Rather, as stated in various commentaries, including the Explanatory Report on the 1980 Hague Child Abduction Convention ("The Explanatory Report"), the Convention's purpose is to protect children from being suddenly taken or uprooted "from the social and family environment in which his life has developed", or in other words, the child's habitual residence.

> **Elisa Perez-Vera, "Explanatory Report", Proceedings of the 14th Session of the Hague Conference Oct 1980 (1980) ("The Explanatory Report") at para. 12 [Book of Authorities of the Appellant ("ABoA"), Tab 15];**
> **Rhona Schuz, *The Hague Child Abduction Convention: A Critical Analysis,* (Hart Publishing, 2013) ("Schuz Book") at pg. 208 [ABoA Tab 23];**

Rhona Schuz, "Habitual Residence of the Child Revisited: A Trilogy of Cases in the UK Supreme Court," (2014) 26 CFLQ 342 ("Habitual Residence of the Child Revisited") at pg. 352 [ABoA Tab 22].

11. In addition, and as stated in the Explanatory Report, although the child's best interests are not to be considered, any interpretation of the Convention must be based on the child's true interests:

> …the struggle against the great increase in international child abductions must always be inspired by the desire to protect children and should be based upon an interpretation of their true interests…In this regard, it would be well to refer to Recommendation 874(1979) of the Parliamentary Assembly of the Council of Europe, the first general principle of which states that "children must no longer be regarded as parents' property, but must be recognized as individuals with their own rights and needs"…the presumption generally stated is that the true victim of the "childnapping" is the child himself, who suffers from the sudden upsetting of his stability, the traumatic loss of contact with the parent who has been in charge of his upbringing, the uncertainty and frustration which comes with the necessity to adapt to a strange language, unfamiliar cultural conditions and unknown teachers and relatives.

The Explanatory Report, at para. 24 [ABoA, Tab 15].

12. The New Zealand Court of Appeal in *Punter v. Secretary for Justice (2007)* also noted that another policy behind the Convention is to facilitate children returning to familiar surroundings and to the place best able to adjudicate on the long-term custody arrangements. The less familiar the circumstances of a prior habitual residence are, and the better able the new jurisdiction is to adjudicate on custody arrangements, the less the rationale for returning a child applies.

***Punter v. Secretary for Justice,* [2007] 1 NZLR 40 ("*Punter v. Secretary for Justice,* 2007") at para. 182 [ABoA, Tab 16].**

13. It is submitted that the meaning of habitual residence must be determined so that it is consistent with the policy of the Convention. Specifically, any definition of habitual residence must include an awareness that the fundamental policy of the Convention is to

protect children from their removal from their social and family environment in which life has developed. Failure to respect this underlying policy will cause harm to children caught in an international custody and access dispute between their parents.

II – DETERMINATION OF HABITUAL RESIDENCE IS FACT INTENSIVE

14. There is no definition of "habitual residence" in the Convention. Courts have held that the expression is not to be treated as a term of art with some special meaning, but is rather to be understood according to the ordinary and natural meaning of the two words it contains.

> ***C. v. S.*, [1990] 2 ALL ER 961 [Book of Authorities of the Respondent Mother ("RMBoA"), Tab 1].**

15. The international and domestic jurisprudence has clearly noted that the determination of habitual residence is a "fact specific inquiry", to be decided according to the facts of each case.

> ***A.S. v. A.W.*, at para. 19;**
> ***Chan v. Chow*, 2001 BCCA 276, [2001] B.C.J. No. 904 at para. 32;**
> **The Explanatory Report, at para. 66 [ABoA, Tab 15].**

16. Although the determination of habitual residence is fact intensive, commentators have noted that legal guidance to such a determination is essential to avoid arbitrary decisions based "purely on the whim of the court". The danger, however, is that such guidance may be interpreted as rigid rules, leading to a legalistic approach which is inconsistent with the factual emphasis to the determination of habitual residence.

> **Schuz Book, at pg. 175 [ABoA, Tab 23];**
> ***Punter v. Secretary for Justice*, [2004] 2 NZLR 28 (C.A.) ("*Punter v. Secretary for Justice, 2004*") at para. 65.**

17. In academic commentary, the current Canadian approach to the definition of habitual residence has been criticized as being problematic because it combines an extremely flexible

standard (consistent with the Convention) with "unfortunately rigid rules". Specifically, the Canadian courts' rigid approach of focusing solely on parental intention (as summarized in *Fasiang v. Fasiangova*) and as used in the court below, has been identified as inconsistent with the fact-driven approach of the Convention and potentially detrimental to children.

> ***Gallagher, Erin,* "A House is Not (Necessarily) a Home: A Discussion of the Common Law Approach to Habitual Residence", (2014-2015) 47 NYU J Int'l L&Pol 463 ("A House is Not (Necessarily) a Home") at pgs.469-476 [ABoA, Tab 6];**
> ***Fasiang v. Fasiangova,* 2008 BCSC 1339, [2008] B.C.J. No. 1892 (S.C.J.) at paras. 60-68.**

18. The Mother submits that the Court of Appeal erred in this case by taking an overly technical approach to the definition of habitual residence, which is contrary to the wording and spirit of the Convention. Specifically, the Court of Appeal erred when it affirmed the following statements as expressing the definition of habitual residence:

a. "One parent cannot unilaterally change a child's habitual residence under the Hague Convention" (para 39).
b. "The habitual residence of a child is the state where both parties lived together with the child" (para 39).
c. "A parent's consent to a time-limited stay does not shift the child's habitual residence" (para 43).
d. "Evidence of settling in is not relevant if the application is brought within one year of the wrongful detention or removal" (para. 56)

> **Court of Appeal Decision, AR, Vol. 1, Tab 20 at paras. 39, 43, 56.**

19. Indeed, the Court of Appeal's affirmation of the rule that "one parent cannot unilaterally change a child's habitual residence under the Hague Convention" is particularly problematic. This particular rule has been rejected by both the New Zealand Court of Appeal and the US 9th Circuit Court of Appeal. In *Punter v. Secretary for Justice (2004)*, the appellate court noted as follows:

> Even the proposition that a change in habitual residence cannot be effected through the unilateral action of one of the parents has been criticized as "having all the marks of the kind of technical legal rule which should not be imported into the law on habitual residence" see Dr. E M Clive, "The Concept of Habitual Residence" (1997) The Juridical Review 137 at 145. Dr. Clive went on to say (at 145-146) that, where both parents have the right to fix the child's place of residence and where they are not in agreement on that question, habitual residence may not be changed quickly but "eventually, however, brute facts will prevail".
>
> ***Punter v. Secretary for Justice*, 2004, at para. 81;**
> **See also *Mozes v. Mozes*, 239 F3d 1067 (9th Cir 2001) ("*Mozes v. Mozes*") at 1080. [ABoA, Tab 10].**

20. In addition, the Court of Appeal's statement that "a parent's consent to a time-limited stay does not shift the child's habitual residence" is inconsistent with the factual nature of the determination of habitual residence. As noted in the Report of the Third Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction at para. 16, where the issue of custody agreements or "shuttle agreements" were discussed:

> Alternating custody agreements, or "shuttle agreements" might give rise to problems in determining the habitual residence of the child. The question arises whether such agreements may determine habitual residence in a way that would be binding on courts requested to order the return of the child, e.g. by including an additional clause that non-return of the child on the date agreed upon constitutes unlawful retention under the Convention or other kinds of choice of court clauses. Such choice of court clauses do not fall to be recognised under the Convention, however, and parties to such an agreement should not have the power to create a habitual residence that does not match with the factual habitual residence of the child. This is, firstly, because the concept of "habitual residence" under the Convention is regarded as a purely factual matter and, secondly, because the Convention provides for a very specific remedy applicable in cases of emergency and is not meant to solve parental disputes on the merits of custody rights.
>
> **Permanent Bureau of the Conference, "Report of the Third Special Commission Meeting to Review the Operation of the Hague Convention on the**

Civil Aspects of International Child Abduction", March 17-21, 1997 at para. 16 [RMBoA, Tab 2];
See also: *Punter v. Secretary for Justice*, 2007, at para. 196 [ABoA, Tab 16].

21. By affirming that a parent's consent to a time-limited stay cannot shift the child's habitual residence as a rule of general applicability, the Court of Appeal espoused a principle that was directly contrary to the interpretation adopted by the Special Commission, and is therefore an error in law.

22. While the statements made by the Court of Appeal can be seen as factors that the court may consider, the Court of Appeal erred when it applied those principles without adequate consideration of the entire factual matrix in this case, as is required by the Convention.

III – HABITUAL RESIDENCE IS NOT DOMICILE

23. Consistent with the factual emphasis of the determination of habitual residence, the drafters of the Convention specifically rejected the use of the word "domicile" and instead adopted the term "habitual residence". The term "habitual residence" was chosen over "nationality" and "domicile" to reflect the desire for the determination to be based on a largely factual, rather than legal inquiry.

The Explanatory Report, at para. 66 [ABoA, Tab 15];
***Punter v. Secretary for Justice*, 2007, at para. 111 [ABoA, Tab 16];**
***Punter v. Secretary for Justice*, 2004, at para. 63.**

24. The hope was that courts would depart from the technical rules governing the concept of domicile, and that the facts of each case would be assessed without resort to presumptions or pre-suppositions.

***Friedrich v. Friedrich*, 983 F.2d 1396 (6th Circuit CA) ("*Friedrich v. Friedrich*") at pg. 1401.**

25. The US 5th Circuit Court of Appeal noted in *Friedrich v. Friedrich* that unlike the inquiry taken to establish domicile, when determining habitual residence, the court must focus on the child, not the parents, and examine past experience, not future intentions.

***Friedrich v. Friedrich*, pg. 1401.**

26. The New Zealand Supreme Court has adopted the following statements with respect to the differences between domicile and habitual residence:

a. Unlike domicile, habitual residence is a matter of fact, determined from a general view of the evidence without an in-depth search for the person's intentions.
b. While domicile is concerned with whether there is a future intention to live elsewhere, "habitual residence" involves only a present intention of residence. There is a weaker animus.
c. Evidence of intention does not have the importance it has in tests for "domicile" but may be a factor in some cases.
d. The requirement for parental agreement for an indefinite stay wrongly equates the concept of habitual residence with domicile (emphasis added).

***Punter v. Secretary for Justice*, 2007, at paras. 110-114 [ABoA, Tab 16].**

27. In Ontario, the differences between habitual residence and domicile has been considered, albeit in the context of s.22 of the *Children's Law Reform Act*. In *Johnson v Athimootil*, the court noted that:

> Domicile is defined in Black's Law Dictionary as "the place at which a person has been physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere". The term habitual residence, by contrast, is a phrase specifically adopted by the Legislation in the CLRA and the language used in the Hague Convention on the Civil Aspects of International Child Abduction…

***Johnson v. Athimootil*, [2007] O.J. No. 3788 (S.C.J.) at para 15.**

28. The court noted that habitual residence does not necessarily imply permanence or an intention to stay permanently, and that the need to determine "intention" under the definition of "domicile" was "notoriously difficult and unpredictable". This difficulty of determining parental intention has also been noted by various commentators who have stated that focusing on parental intention encourages litigation as it is subject to the views of warring parents and difficult to objectively verify.

See, for example *Rhona Schuz*, "Habitual Residence of Children under the Hague Abduction Convention: Theory and Practice" (2001) 13 CFLQ 1 ("Theory and Practice") at pg. 12 [ABoA, Tab 21].

29. As noted in "Back to Basics: determining a Child's Habitual Residence in International Child Abduction Cases Under the Hague Convention":

> ...it is considered a "well-established concept" in the Hague Conferences that habitual residence is different from the concept of domicile. Domicile requires an intent to reside in a country of choice permanently or indefinitely, as well as actual physical presence in that country. One must have, in addition to an intent to reside in the country of new domicile, an intent to leave the country of previous domicile. Consideration of a person's intention to remain in a place is complex and intricate, and courts must often make determinations of domicile without the guidance of concrete rules.

Tai Vivatvaraphol, "Back to Basics: Determining a Child's Habitual Residence in International Child Abduction Cases Under the Hague Convention" (2009) 77 Fordham Law Review 66 ("Back to Basics"), at pg. 3338.

30. The author in "Back to Basics" further noted that the habitual residence definition was adopted because a domiciliary-style intent test would be complicated to apply to children and because of its flexibility to respond to the demands of society. He also argued that the parental intention model as adopted by many common-law courts (and particularly the 9th Circuit in the United States) inappropriately conflates the concepts of habitual residence and domicile.

"Back to Basics" at pg. 3338.

31. The Mother submits that in this case, the Court of Appeal's approach was reminiscent of a determination of domicile rather than habitual residence. Specifically, the Court of Appeal's emphasis on the parties' apparent intention to return to Germany after 16 months, the time-limited nature of the consent, the lack of permanency contemplated by the move, and the lack of abandonment of Germany, are more consistent with the inquiry necessary to determine domicile than habitual residence. This approach is inconsistent with the aims of the Convention.

IV – HABITUAL RESIDENCE IS A THRESHOLD ISSUE AND MUST BE DETERMINED FIRST

32. Habitual residence is a threshold issue that must be determined first. Only after the determination of habitual residence is made is the court to assess whether there has been a breach of rights of custody according to the laws of that country.

> ***Convention,* at Article 3(a);**
> ***Feder v. Evans-Feder,* 63 F.3d 218 (3rd Cir. CA) ("*Feder v. Evans-Feder*") at para. 15. [ABoA, Tab 4];**
> ***Gitter v. Gitter,* 396 F.3d 124 (2nd Cir. CA) ("*Gitter v. Gitter*") at para. 8. [ABoA, Tab 7].**

33. One of the problems with a definition of habitual residence that focuses solely on parental intention is that it puts the second question first – namely, a court is to determine which parent had rights of custody and then whether that parent had the requisite intention to change the child's residence. As noted by at least one commentator, this approach is circular in reasoning and inconsistent with the framework of the Convention which clearly requires the child's habitual residence to be determined first.

Schuz Book, at pg. 204. [ABoA, Tab 23].

34. As noted by the New Zealand Court of Appeal in *Punter v. Secretary for Justice (2007)*, the policy of the Convention is not "deterrence of abduction and retention per se". Rather, the policy is to deter abduction or retention from the place of habitual residence. As a result, the decision as to habitual residence is "logically prior" to that of retention.

***Punter v. Secretary for Justice*, 2007, at para. 181 [ABoA, Tab 16].**

35. This problem of the impact of custodial rights was specifically adverted to in the Explanatory Report at para. 12. In that paragraph, while explaining the harm occasioned by the removal of a child from his habitual residence, the reported note as follows:

> What is more, in this context the type of legal title which underlies the exercise of custody rights over the child matters little, since whether or not a decision on custody exists in no way alters the sociological realities of the problem.

The Explanatory Report, at para. 12 [ABoA, Tab 15].

36. The necessity of keeping the determination of habitual residence separate from the breach of custody rights is consistent with the fact-driven nature of the analysis. The danger of conflating habitual residence with the determination of custody rights is that courts will focus exclusively on the wrongful act of removal or retention without first engaging in the factual inquiry necessary to determine the child's connection to a jurisdiction, leading to absurd results.

37. In the case at bar, the Court of Appeal has inverted the inquiry by using the apparent breach of rights of custody to determine the children's of habitual residence. This can be seen at paragraph 47, where the Court of Appeal stated that the definition of habitual residence in *Korutowska-Woof* "could not have intended to lay down a definition of habitual residence that would allow one parent to displace the custodial rights of the other by contravening the terms of an agreement to take the child to another jurisdiction for a time-limited stay". By so stating, the Court of Appeal has erroneously described the inquiry to be engaged in. The

inquiry of the court at the habitual residence stage is not to make a judgment on whether a parent's rights to custody were displaced by the actions of the other parent. Rather, the inquiry is to determine the child's actual connection to the jurisdiction. By conflating the issue of custodial rights with habitual residence, the Court of Appeal committed an error in law.

Court of Appeal Decision, AR, Vol. 1, Tab 20 at para. 47.

V - THE PARENTAL INTENTION APPROACH LEADS TO ABSURD RESULTS

38. As noted by commentators, if strictly applied, the paternal intention model, with its emphasis on determining the intent of the parents with custody rights may lead to a determination that a child is habitually resident in a country with which the child has relatively little connection. For example, in extreme cases involving the retention of a child after a lengthy time-limited stay of many years, the parental intention model will nevertheless determine habitual residence to be the child's country of origin.

Bailey, Martha, "*Balev v. Baggott*: The Child's Perspective in Determining Habitual Residence", 36 CFLQ 227 at pg. 228-229 [ABoA, Tab 1];
Theory and Practice, at pg. 11-12 [ABoA, Tab 21].

39. An additional concern with the strict parental intention model is its failure to take into account the factual circumstances arising from a modern mobile society. As noted in commentary on the modern interpretation of the Convention, at the time of the Convention's drafting, the primary concern was with non-primary caregivers removing children from the primary caregiving parent, usually the mother. However, statistics on applications made under the Convention show that increasingly applications are being made by non-primary parents who are seeking to remove the children from their mothers. A deeper analysis of this suggests that the primary caregivers have been returning to their home countries with their children to escape domestic violence against themselves. While this is in part dealt with under Article 13b of the Convention, which offers a defence to the abduction that return would place the children in danger, the evidentiary bar under the defence is high, and the

Mother would submit places an almost impossible onus on the responding party to the application. As a result an unfortunate outcome of the strict parental intention model is to return victims of domestic violence back into the control of their aggressor.

Brian Quillan, "The New Face of International Child Abduction: Domestic Violence Victims and their treatment under the Hague Convention on the Civil Aspects of International Child Abduction" (2014) 49:621 Texas Int. L. J. 621 at 625;
Hague Convention on Private International Law (HCCH), A Statistical Analysis of Applications Made in 2008 under the Hague Convention of 24 October 1980 on the Civil Aspects of International Child Abduction, Special Commission of June 2011 on the practical operation of the Hague Child Abduction Convention, Prel. Doc. No 8 C (May 2011).

VII- THE PARENTAL INTENTION APPROACH HAS BEEN REJECTED IN OTHER JURISDICTIONS

40. Virtually every international jurisdiction has rejected an approach to the determination of habitual residence that focuses only on parental intention.

41. In *In the matter of A (Children)*, the UK Supreme Court specifically abandoned the parental intention approach derived from *R. v. Barnet London Borough Council, ex p Shah*. Instead, the court specifically adopted a test for habitual residence "focused on the situation of the child, with the purposes and intention of the parents being merely one of the relevant factors".

***In the matter of A (Children),* [2013] UKSC 60 at para. 54(v).**

42. In New Zealand, the Court of Appeal has held in two separate judgments that an approach which only considers parental intention is not consistent with the Convention. They specifically considered the arguments supporting a strictly parental intention approach and rejected it in favour of a factual, child-centered approach based on all of the relevant factors. The Court explicitly stated that "the view that factual considerations can change habitual residence only in exceptional circumstances cannot be correct".

***Punter v. Secretary for Justice*, 2007, at para. 215 [ABoA, Tab 16]**
***S.K. v. K.P.*, [2005] 3 NZLR 590 (C.A.) [RMBoA, Tab 3].**

43. The Courts of Justice of the European Union in *Mercredi v. Chaffe* has also stated that when determining habitual residence, the intention of the person with parental responsibility, manifested by "certain tangible steps" may constitute an indicator of the transfer of habitual residence. The Court indicated that the concept of "habitual residence" must be interpreted as meaning that such residence corresponds to "the place which reflects some degree of integration by the child in a social and family environment".

***Mercredi v. Chaffe*, C-497/10 ("*Mercredi v. Chaffe*") at paras. 47, 50.**

44. The debate between a parental intention and objective approach appears to be the most lively among US circuit courts. However, even US Circuit Courts that have advocated for a parental intention model have generally recognized that parental intent alone cannot establish a child's habitual residence. As noted by some commentators, the dialogue among the US courts is not that objective facts matter, but rather a question of how important those facts are vis-a-vis parental intention.

***Gitter v. Gitter*, at para. 17 [ABoA, Tab 7];**
See eg. *Mozes v. Mozes*, at 1080-1081 [ABoA, Tab 10].

VII – THE DETERMINATION OF HABITUAL RESIDENCE MUST BE BASED ON A "HYBRID APPROACH"

45. As argued above, the Respondent mother submits that adopting a strictly parental intention approach is inconsistent with the aims of the Convention, can lead to absurd and inconsistent results, and is inconsistent with international jurisprudence on this issue.

Beaumont, Paul and Jayce Holliday, "Recent Developments on the Meaning of "Habitual Residence" in Alleged Child Abduction Cases" (2015) University of

Aberdeen, Working Paper Series, No. 2015/3 ("Recent Developments on the Meaning of Habitual Residence") [ABoA, Tab 2].

46. The Respondent mother submits that the Court should adopt a hybrid approach to the question of habitual residence. Specifically, courts should consider all of the circumstances relevant to the child's connection to the jurisdiction, taking into account parental intention as one of the factors to be considered. This approach is largely consistent with the developing jurisprudence in New Zealand, the United Kingdom, the European Union, and most Circuit Courts in the United States (to varying degrees).

Back to Basics, at pg. 3365.

47. The hybrid approach was adopted by the US 3rd Circuit Court of Appeal in *Feder v. Evans-Feder*. Specifically, that court held that a child's habitual residence is "the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a 'degree of settled purpose' from the child's perspective." Such a determination consists of an analysis of the child's circumstances and the parents' present, shared intentions, regarding their child's presence. In holding that Australia was the child's habitual residence despite only living there for 6 months as of the time of the child's removal, the court focused on the objective facts of the child's connection to Australia. These facts included the child's attendance at school, the parties' purchase of a home in Australia, and the parties' pursuit of employment and interests in the jurisdiction.

***Feder v. Evans-Feder*, at paras. 22-24 [ABoA, Tab 4].**

48. In *Punter v. Secretary for Justice (2007)*, the New Zealand Court of Appeal said that the inquiry into habitual residence is a "broad factual inquiry". The Court also held that competing policy factors should be weighed, but the factual nature of the inquiry should not be obscured by those policy factors or by an adherence to rigid rules. Parental purpose should be treated as an important factor, but not decisive.

***Punter v. Secretary for Justice*, 2007, at para. 189 [ABoA, Tab 16].**

49. In *Punter v. Secretary for Justice (2007)*, the court approved the factors reviewed by the trial judge and added additional considerations that the court considered important. These included:

a. The parents' settled purpose for a delimited stay in New Zealand for two years with the mother.
b. The custodial parent's intention with respect to residence.
c. The nature of the agreement.
d. The actual length of the stay.
e. The strength of ties with the prior habitual residence (Australia).
f. The limited contact between the father and the children.
g. The similarity in cultures between the two jurisdictions.
h. The children's cultural and social connections to both jurisdictions.
i. The details of the children's lives including whether they attended school and had developed a social network.
j. The children's extended family connection in both jurisdictions.

***Punter v. Secretary for Justice*, 2007 at paras. 190-200 [ABoA, Tab 16].**

50. In the Court of Justice of the European Union, the definition of "habitual residence" under Article 8(1) of the Brussels IIA Regulation (No. 2201/2003) was discussed in the cases of *Re A* and *Mercredi v. Chaffe*. In *Re A*, the Court held that:

> ...The concept of 'habitual residence' under Article 8(1) of the Regulation must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case.

***Re A, C-523/07* at para. 48.**

51. These factors were subsequently expanded in *Mercredi v. Chaffe*, and included a parent's intent (as manifested by tangible steps) and additional considerations if the child is young.

***Mercredi v. Chaffe* at para. 50-54.**

52. The definition of habitual residence as stated by the Court of Justice of the European Union was adopted by the UK Supreme Court in *In the matter of A (Children),* and it was explicitly noted that the definition of "habitual residence" should be the same under the Brussels IIA Regulation and the Convention.

***In the matter of A (Children),* [2013] UKSC 60 at paras. 35 and 54.**

53. The Respondent mother submits that while a list of factors as guidance is helpful, it needs to be emphasized that the list is non-exhaustive. A non-exhaustive list would prevent courts from interpreting the list as "legal" or "technical" principle, which would be inconsistent with the factual nature of the determination of habitual residence. In the article, "A House is Not (Necessarily) a Home: A Discussion of the Common Law Approach to Habitual Residence", the author noted that "the best option for the Hague Conference would be to follow this [the CJEU test] approach and create a non-exhaustive list of factors in order to guide courts while still allowing for flexibility within the standards".

A House is Not (Necessarily) a Home, at pg. 496 [ABoA, Tab 6].

54. Further, in determining habitual residence, courts should not consider any legal element at this stage. As noted above, taking into consideration custodial rights at this stage inverts the analysis and takes the focus away from the factual matrix of the case. In addition, it complicates the inquiry because legal findings can be manipulated. For example, considering legal elements allows a defeated party to continue to control the habitual residence of their child simply by appealing a judgment that has taken that control away.

Recent Developments on the Meaning of Habitual Residence [ABoA, Tab 2].

VIII – THE RELEVANT "PARENTAL INTENT" IS THE INTENTION FOR THE CHILD TO ESTABLISH A PLACE OF RESIDENCE IN A PARTICULAR PLACE

55. Although there is conflict in international jurisprudence as to the weight to be placed on parental intention, there is general agreement that there must be objective manifestations of the intent. For example, even the 9th Circuit Court of Appeal in *Mozes* noted that a shift in habitual residence cannot be accomplished by "wishful thinking alone". In *Punter v. Secretary for Justice (2004),* the New Zealand Court of Appeal stated that it is necessary to examine the subjective intent of the parents and also the "objective manifestations of the intent".

***Mozes v. Mozes*, at 1078 [ABoA, Tab 10];**
***Punter v. Secretary for Justice,* 2004 at para. 71.**

56. Courts have identified a few principles when assessing parental intent in the context of determining habitual residence. These are as follows:

a. The relevant intent does not require a settled purpose to reside in a place forever, rather it can be settled purpose to reside in a place for a limited period.

***Punter v. Secretary for Justice*, 2004 at para. 67.**

b. Future intention is a concept consistent with domicile and is irrelevant to the determination of habitual residence. A future intention to return to a place does not mean that the child's habitual residence is in that country.

***Friedrich v. Friedrich*, at pg. 1401.**

c. The relevant time at which to determine joint parental intentions is immediately prior to the wrongful retention or removal. Therefore, where both parents agreed that the

children would live in New Zealand with their mother for alternating two year periods was the relevant mutual intention for the purposes of determining habitual residence.

***Punter v. Secretary for Justice*, 2007, at para. 40 [ABoA, Tab 16].**

57. In this case, the Court of Appeal erred by specifically affirming that there is "an implication of permanency that needs to be read into" habitual residence. It also erred when it determined habitual residence to be where the parents last lived together, rather than where they last jointly intended the children to live, which was in Ontario.

Court of Appeal Decision, AR, Vol. 1, Tab 20 at paras. 39, 46.

IX – APPLICATION OF THE HYBRID MODEL TO THE FACTS OF THIS CASE

58. Under the proposed Hybrid Model the case at bar would have been decided very differently. An examination of the totality of circumstances would have determined, as was found by the Divisional Court, that the children's habitual residence was, in fact, Ontario, Canada, and that there was no wrongful detention. This would have negated the necessity of the Mother and children's return to Germany, ultimately leading to less risk of placing the children into harm.

59. Under the Hybrid Model, as with the parental intent model, the date of alleged wrongful retention would have been August 16, 2014. This is the earliest date when the children were living in Canada without the express consent of the Father. This is consistent with the findings in the courts below.

60. Under the Hybrid Model, the last shared parental intent was for the children to reside in Canada, albeit for a temporary settled purpose.

61. In this case, the objective evidence of shared parental intention is clear. It is undisputed that both parents had agreed to the Mother and children returning to Canada from April 19, 2013

until August 15, 2014. The parents had both signed a consent for the children to return to Canada and the Father had agreed to the Mother having temporary sole custody of the children. The parents only differ in their intent once the period of consent is over, that is August 16, 2014, for which we only have subjective evidence, that is, the testimony of the parents, made after the fact, and, in both cases, supportive of their own litigation positions.

62. However, the Hybrid Model requires a further inquiry beyond parental intent alone, including looking at both the children's views and the objective facts surrounding their integration into the community. As noted above, the inquiry beyond parental intent is important to ensure that disparate outcomes are avoided.

63. Applied to the facts of this case, it is undisputed that as of August 16, 2014, the children were fully integrated into their community in St. Catharine's Ontario. They had attended school for more than an entire year. They reported comfort in speaking English and studying in English. They were engaged in social activities in their community. They were living with their mother and maternal grandmother. The Mother had taken employment in community in order to support them. The Father had ceased to provide financial support, and had, in fact, only visited with them once in sixteen months. They had a pet dog. They reported wishing to stay in Canada. Under a Hybrid Model, these facts would have played a key role in determining the habitual residence.

64. Combining the objective factors of the children's integration, and the intentions of the parents for what the children's residence should be immediately prior to the alleged wrongful detention, it becomes clear that the children's habitual residence had to be Canada. The parents had both intended for the children to be in Canada, and the children had become integrated into the community. To remove them from this environment against their will would undermine the objectives of the Convention as previously stated.

X – THE FATHER'S 10-MONTH DELAY WAS ACQUIESCENCE PURSUANT TO ARTICLE 13(A)

65. The Appellant's position raises the issue of how courts should assess post-retention facts in an application under the Convention. The Respondent mother submits that an important post-retention fact that courts should assess is the left-behind parent's unreasonable delay in having his application heard, and its impact on the ultimate outcome of the application.

66. In this case, although the Respondent father commenced his Hague application shortly after the children were retained in Canada, he delayed the hearing of his application by 10 months. By the time the application was actually heard by the Superior Court of Justice, the children had been in Canada for 23 months. Although the motions judge noted that the parties had attempted to transfer the file to Toronto, she found that the main reason for the delay was the Respondent father's decision to pursue court orders in Germany in his favour. The Court of Appeal characterized the Respondent father's actions as akin to "forum shopping".

Superior Court Decision, AR, Vol. 1, Tab 11, at para. 37.
Court of Appeal Decision, AR, Vol. 1, Tab 20, at para. 62.

67. While the words of the Convention do not expressly prohibit forum shopping, Canadian courts have held that the Convention is designed to discourage forum shopping. For example, by insisting that the courts of the child's habitual residence decide the issue of custody, the Convention renders forum shopping ineffective.

***Carabelea v Carabelea*, [2009] B.C.J. No. 1383 (Sup. Ct.) at para. 17;**
***Cannock v. Fleguel*, [2008] O.J. No 4480 at para. 23.**

68. A concern about forum shopping is consistent with the stated aim of the Convention, which is to ensure the prompt return of children, should it be found that they were wrongfully removed or retained. Indeed, the judicial system has recognized the importance of prompt action by putting in place various mechanisms to ensure that Convention cases are promptly heard. Prompt action by courts is important to "minimize the anxiety and unsettlement of

the child and to avoid assimilation of the child into strange environs which could lead to subsequent difficulties in separation."

> ***Convention,* at Preamble;**
> ***P. v. B.* (No. 2), [1999] 4 IR 185 (*"P. v. B. (No. 2)"*) referencing *Zaiaczkowski v. Zaiaczkowska*, 932 F Supp 128 (D Md 1996);**
> **The Explanatory Report, para. 104 [ABoA, Tab 15].**

69. Consistent with this emphasis on prompt action, Article 11 of the Convention states that if a determination has not been made within six weeks from the date of commencement of the proceedings, an explanation for the delay may be requested. This time limit, while not obligatory, is important because the language anticipates that six weeks is sufficient time for the Court to reach a decision on the petition.

> ***P v. B. (No. 2)* at pg. 212.**

70. In *P. v. B.*, the Supreme Court of Ireland noted that in cases where the left-behind parent delays proceedings, there may be "culpable delay" on the part of that parent. The legal consequence of such culpable delay is that it would be a form of acquiescence. Specifically:

> Delay is contrary to the Hague Convention. Significant culpable delay by a requesting party is contrary to the fundamental policy of the Convention. Sometimes culpable delay may be a form of acquiescence. However, there may well be circumstances where there is culpable delay and yet no acquiescence. It may well be reasonable to determine in certain circumstances that delay by an applicant is such that the Convention procedures are not applicable.

> ***P. v. B. (No. 2)* at pg. 217.**

71. Similarly, in *Ostevoll v. Ostevoll*, the District Court of Ohio, held that delaying tactics cannot be tolerated by the Court and that such conduct would be evidence of acquiescence. In that case, as in this one, the Petitioner filed his application for the return of the children promptly (less than one month after their removal). However, since filing his petition, the Petitioner consistently engaged in delaying tactics "which belie his stated intentions of

seeking the return of his children". The court found that the Petitioner's dilatory conduct had demonstrated a "consistent attitude of acquiescence" to the children's retention in the United States under Article 13(a).

***Ostevoll v. Ostevoll*, F.Supp.2d (S.D. Ohio) at paras. 12, 19, 20.**

72. In this case, the Respondent Mother submits that the Respondent father's conduct was consistent with an attitude of acquiescence and should be interpreted as such, separate and apart from the question of habitual residence. The Respondent father was clearly aware of the Hague Convention as he had attempted to apply for the children's return shortly after they left Germany with his consent. Instead of pursuing his remedy expeditiously in Canada, he chose to obtain judicial opinions about the definition of habitual residence from courts in Germany. He appealed those orders on multiple occasions. It was only after it was clear that he would not succeed in Germany that he recommenced his application in Canada. During this period, he was aware or should have been aware that the children were residing with their extended family in Canada, attending school in Canada, making friends, and was further developing their connections to the jurisdiction. The father's actions showed that he acquiesced to this situation and specifically, the social and family environment that the children were developing in Canada.

XI - CONCLUSION

73. The Respondent Mother submits that the appropriate test for determination of habitual residence is the Hybrid Model proposed above. That is, the Application Court should consider the following, non-exhaustive list of factors in determining habitual residence:

a. The objective intent of the parents in determining residence, not domicile.
b. Custodial parent's intention with respect to residence.
c. Social and financial support by the absent parent.
d. Length of stay.
e. Strength of ties of the children to both jurisdictions.

f. The stated views and preferences of the children.

g. The objective facts surrounding the settled nature of the children i.e.

h. Attendance at school.

i. Community involvement.

j. Location of family.

k. Linguistic knowledge.

74. Had that test been applied to the facts of this case, the habitual residence would clearly have been Canada, and the Application Court would have found that no wrongful removal or retention had taken place.

PART IV - COSTS

75. The Respondent Mother does not seek costs of this appeal and asks that no costs be ordered against her.

PART V - ORDER REQUESTED

76. The Respondent Mother requests that the judgment of the Court of Appeal for Ontario, dated September 13, 2016, be set aside and that the Application of the Respondent father J.P.B. be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 25th day of September, 2017.

Patric Senson and Tammy Law
Counsel for the Respondent, C.-R. B

Yael Wexler
Agent for Counsel for the Respondent, C.-R. B.

PART VI - TABLE OF AUTHORITIES

PART VII - STATUTES

Hague Convention on the Civil Aspects of International Child Abduction
25 October 1980, CAN TS 1983 No 35

Preamble

The States signatory to the present Convention,

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions:

Article 3

The removal or the retention of a child is to be considered wrongful where -

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that -

a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

II – Brussels II Regulation No. 2201/2003

Article 8

1. The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State that the time the court is seised.

III – Children's Law Reform Act, R.S.O. 1990, c.C.12

Section 22

22 (1) A court shall only exercise its jurisdiction to make an order for custody of or access to a child where,

(a) the child is habitually resident in Ontario at the commencement of the application for the order;

(b) although the child is not habitually resident in Ontario, the court is satisfied,

(i) that the child is physically present in Ontario at the commencement of the application for the order,

(ii) that substantial evidence concerning the best interests of the child is available in Ontario,

(iii) that no application for custody of or access to the child is pending before an extra-provincial tribunal in another place where the child is habitually resident,

(iv) that no extra-provincial order in respect of custody of or access to the child has been recognized by a court in Ontario,

(v) that the child has a real and substantial connection with Ontario, and

(vi) that, on the balance of convenience, it is appropriate for jurisdiction to be exercised in Ontario. R.S.O. 1990, c. C.12, s. 22 (1).

Habitual residence

(2) A child is habitually resident in the place where he or she resided,

(a) with both parents;

(b) where the parents are living separate and apart, with one parent under a separation agreement or with the consent, implied consent or acquiescence of the other or under a court order; or

(c) with a person other than a parent on a permanent basis for a significant period of time,

whichever last occurred. R.S.O. 1990, c. C.12, s. 22 (2); 2016, c. 23, s. 6.